SUPREME COURT NO. 84296-5

COURT OF APPEALS NO. 62167-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

PHOENIX DEVELOPMENT, INC., a Washington Corporation, and G&S SUNDQUIST THIRD FAMILY LIMITED PARTNERSHIP, a Washington limited partnership,

Appellants,

v.

CITY OF WOODINVILLE, a Washington Municipal Corporation, and CONCERNED NEIGHBORS OF WELLINGTON, a Washington Nonprofit Corporation,

Respondents.

PHOENIX DEVELOPMENT'S ANSWER TO AMICUS MEMORANDUM OF WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS AND ASSOCIATION OF WASHNGTON CITIES

G. Richard Hill, WSBA 8806
McCullough Hill P.S.
701 Fifth Avenue, Suite 7220
Seattle, WA 98104
(206) 812-3388

John M. Groen, WSBA 20864
Groen Stephens & Klinge
11100 NE 8th Street, Suite 750
Bellevue, WA 98004
(425) 453-6206

ORIGINAL

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I. IDENTITY OF PARTIES ANSWERING AMICUS MEMORANDUM

This answer is filed by Appellants Phoenix Development, Inc. and G&S Sundquist Third Family Limited Partnership ("Phoenix").

II. COURT OF APPEALS DECISION

Phoenix Development, Inc. v. City of Woodinville, No 62167-0-I, 2009 Wash.App. LEXIS 2684 (Wn.App. Div. I, Nov. 2, 2009) ("*Phoenix*"). Amicus supports the City's Petition for Review.

III. ISSUE ADDRESSED BY AMICUS

Amicus offers additional argument on City of Woodinville Issue 1. See Amicus Memorandum at 3; City of Woodinville Petition at 1. Phoenix restated Issue 1 in its Answer at 1.

IV. INTRODUCTION

Amicus suggests that there is a "critical" need for "definitive Supreme Court guidance" on the question whether "a local legislative body may be judicially compelled to grant a site-specific rezone." Amicus Memorandum at 3-4. RAP 13.4(b)(4).

However, such "definitive Supreme Court guidance" is necessary only if the law is unclear. Here, because the law is unambiguous, there is no "critical need" for "definitive Supreme Court guidance."

Indeed, Amicus does not dispute any of the following:

1. A site-specific rezone is a "project permit." RCW 36.70B.020(2).

2. A decision by a local jurisdiction's body with the highest level of authority to make a decision on a "project permit" is a "land use decision." RCW 36.70C.020(1).

3. The Land Use Petition Act, Chapter 36.70C RCW ("LUPA"), is the "exclusive means" of judicial review of "land use decisions," which establishes "uniform criteria for reviewing such decisions..." RCW 36.70C.010-.030.

4. The criteria for reviewing land use decisions are set forth at RCW 36.70C.130.

5. RCW 36.70C.130 provides that a court "may grant relief" with respect to a land use decision "if one of the criteria set forth in RCW 36.70C.130 has been met."

6. RCW 36.70C.140 defines the relief that may be granted by a court under LUPA, in the event one of the RCW 36.70C.130 criteria is met: "the court may affirm or reverse the land use decision under review..."

Nor does Amicus dispute that, in this case, the Court of Appeals reviewed a "land use decision" of the Woodinville City Council to determine whether one of the criteria set forth in RCW 36.70C.130 had

been met, found that Phoenix had met its burden on that score, and granted the relief authorized by RCW 36.70C.140.

Amicus does not contend that the Court of Appeals erred in its application of the LUPA standards to the City's land use decision, or that the Court of Appeals in granting relief exceeded the authority granted by LUPA.

Rather, Amicus argues that the Court of Appeals should simply have ignored the LUPA standards in reviewing the City's land use decision, and should have refused to grant the relief authorized by LUPA.

Because, however, Amicus concedes that LUPA is applicable, and points to no ambiguity in the statute, there is neither need nor justification for Supreme Court review of the *Phoenix* decision. RAP 13.4(B)(4).

V. ARGUMENT

A. The Supreme Court Has Already Ruled That Site-Specific Rezone Decisions Are "Project Permit Land Use Decisions" Subject to Review Under LUPA.

Amicus suggests that the Supreme Court has not yet ruled on the question of whether site-specific rezone decisions are subject to review and reversal under LUPA. Amicus Memorandum at 4-5. Accordingly, Amicus contends, the Supreme Court should grant review in this case.

However, the premise of Amicus' argument is incorrect. The Supreme Court has ruled recently, and unequivocally, that site-specific

rezone decisions are subject to review under LUPA. *Woods v. Kittitas County,* 162 Wn.2d 597, 174 P.3d 25 (2007).

In *Woods,* the Court held that "a site-specific rezone is a project permit, RCW 36.70B.020(4), and, thus, a land use decision." 162 Wn.2d at 610. The Court also held that "local development regulations, including zoning regulations, directly constrain individual land use decisions." Id. at 614. The Court made it clear that it reviews "administrative decisions" such as site-specific rezones under the substantial evidence standard and conclusions of law de novo, as set forth in RCW 36.70C.130. Id. at 616.

Amicus cites *Duckworth v. Bonney Lake,* 91 Wn.2d 19, 27, 586 P.2d 860 (1978) for the proposition that Washington courts have historically acknowledged that the "wisdom, necessity and policy" of zoning decisions are matters left "exclusively to the legislative body" of each city. Amicus Memorandum at 5. *Duckworth,* however, is wholly inapposite, not only because it was decided 17 years before the adoption of LUPA, but also because it involved a constitutional challenge to a city's *legislative* zoning ordinance, not to a *quasi-judicial,* site-specific rezone land use decision such as the City's decision in *Phoenix.* Moreover, even in the legislative context of area-wide zoning ordinances, the Court's statement of the law in 1978 is no longer consistent with the law in effect today. Indeed, since the adoption of Chapter 36.70A RCW, the Growth

Management Act ("GMA"), the "wisdom, necessity and policy of [area-wide] zoning decisions" are now subject to review by the Growth Management Hearings Board for compliance with the goals and policies of GMA. *Woods, supra,* 162 Wn.2d at 611, n. 7. The Growth Management Hearings Board has explicit statutory authority to *invalidate* local legislative zoning decisions. RCW 36.70A.302.

Amicus cites another dated case, *Teed v. King County,* 36 Wn.App. 635, 677 P.2d 179 (1984), for the proposition that a court cannot "compel a city council to grant a proposed rezone against the council's will." Amicus Memorandum at 4. *Teed*, however, involved a request for a writ of mandamus pursuant to RCW 7.16.150 et seq. Because site-specific rezones are discretionary, the court held that mandamus was not available as a remedy to compel a rezone. The holding of *Teed* is inapposite to this challenge brought under LUPA (a statute adopted 11 years after *Teed* was decided). LUPA specifically grants the court the authority to "reverse" a city's rezone decision when the criteria of RCW 36.70C.130 have been met.

Clearly there is no separation of power question (see Amicus Memorandum at 4) when a court reviews a land use decision pursuant to a statute adopted by the state legislature which specifically directs the court to review the land use decisions of local jurisdictions, including decisions

on site-specific rezones, and which authorizes courts to reverse those decisions if they have been made unlawfully. In *State v. Billie,* 132 Wn.2d 484, 489-490, 939 P.2d 691 (1997), the Court held that the separation of powers doctrine does not depend on the branches of government being hermetically sealed off from one another. The different branches must remain partially intertwined if for no other reason than to maintain an effective system of checks and balances. In adopting LUPA, the Washington legislature made the policy determination that site-specific rezone decisions would be subject to the "check and balance" of judicial review pursuant to LUPA standards and remedies. It was fully consistent with the separation of powers doctrine for the legislature to do so.

Because *Woods* holds unambiguously that site-specific rezone decisions are subject to review under LUPA, there is no "critical need" for Supreme Court review of the *Phoenix* decision. RAP 13.4(B)(4).

B. The Supreme Court Has Clearly Addressed the Criteria for Judicial Review of Site-Specific Rezones.

Amicus claims that "the Supreme Court has not addressed whether LUPA alters the substantive standards for judicial review of rezone denials." Amicus Memorandum at 5.

Amicus does not define what it means by "the substantive standards for judicial review of rezone denials."

However, neither Phoenix, nor the Court of Appeals, has argued that LUPA alters "the substantive standards for judicial review of rezone denials."

What both Phoenix and the Court of Appeals have acknowledged, however, is that since the adoption of LUPA, it is no longer necessary to prove that a site-specific rezone decision was "arbitrary and capricious" in order to obtain relief. *Henderson v. Kittitas County,* 124 Wn.App. 747, 752 N. 2, 100 P.3d 842 (2004). Since the adoption of LUPA, the decisions of local legislative bodies acting administratively and quasi-judicially on site-specific rezone applications are to be reviewed under the substantial evidence standard and error of law standard set forth in RCW 36.70C.130. Amicus itself fully acknowledges that site-specific rezone decisions are subject to these standards. Amicus Memorandum at 6-7.

The Supreme Court in *Woods, supra,* indeed, specifically held that site-specific rezone decisions are subject to review under LUPA to determine whether they are consistent with local development regulations.

> In reviewing a proposed land use project, a local government must determine whether the proposed project is consistent 'with the applicable development regulations, or in the absence of applicable regulations the adopted comprehensive plan'... [L]ocal development regulations directly constrain individual land use decisions."

162 Wn.2d at 613.

As the Court of Appeals Decision explicitly stated in *Phoenix*, the "substantive standards" for approval or denial of site-specific rezone applications are not defined by LUPA, but rather by the local jurisdiction's development regulations. The issue for the court is whether the City's denial complies with the City's own zoning regulations:

> An applicant may challenge the denial of a rezone request on the basis that a local jurisdiction did not follow its own development regulations. Local development regulations, including zoning regulations, directly constrain land use decisions. Here, Phoenix alleges that the city council failed to follow the city's zoning code when it denied the rezone requests.

Phoenix, Slip Op. at 11-12 (citing *Woods, supra*).

Amicus misstates the argument of Phoenix and the holding of the Court of Appeals when it asserts:

> Both Phoenix Development and the Court of Appeals in the instant matter have construed [the RCW 36.70C.130] standards as authorizing courts to substitute their policy judgment regarding the "need" for a proposed rezone for that of the local legisltive [sic] body...

Amicus Memorandum at 7.

Clearly neither Phoenix nor the Court of Appeals has suggested such a thing. Had they done so, one would assume Amicus would have cited to Phoenix's brief or to the Court of Appeals decision on that score. Amicus provides no such citation. This "construction" of LUPA, allegedly to have been made by Phoenix and the Court of Appeals, is a phantom of Amicus' own imagination.

Phoenix indeed did not ask the court to substitute its own policy judgment for that of the local jurisdiction. Rather, Phoenix asked the court to determine whether the City's *administrative* land use decision was consistent with the policy determinations set forth in the City's *legislatively* adopted zoning code. The City's *legislatively* adopted policy decision as to "need" for R-4 zoning in the City is clear: "Development with densities less than R-4 are allowed only if adequate services cannot be provided." WMC 21.04.080.

The "substantive standards" for a rezone decision are set forth in the local jurisdiction's zoning code. The criteria for reviewing the city's rezone decision are set forth in LUPA. See *Woods, supra.* The issues raised by Amicus have already been answered by LUPA and *Woods.* There is no need for Supreme Court review. RAP 13.4(b)(4).

C. The Issues Implicated in *Phoenix* Will Continue to Arise Only if Municipalities Fail to Follow Their Own Legislative Policy When Making Administrative Site-Specific Zoning Decisions.

Amicus contends that the Court of Appeals Decision "effectively enables courts to usurp the historic, exclusive role of local legislative bodies in rezoning property." Amicus Memorandum at 9. Amicus argues that the Court of Appeals Decision allows "developers to dictate zoning map amendments in disregard of the preferences, policies and timetables established by city and county councils." Id.

Nothing could be further from the truth. To the contrary, the Court of Appeals decision in this case did nothing more than ensure that the City of Woodinville's site-specific rezone decision complied with the City Council's own, well-established, unambiguous, legislative policy: "Developments with densities less than R-4 are allowed only if adequate services cannot be provided." WMC 21.04.080.

It was not the Court of Appeals that established this policy. Nor did Phoenix "dictate" this policy to the City. It was the Woodinville City Council that established this policy, acting in its legislative capacity.

Once that legislative policy was established, as the Supreme Court stated in *Woods, supra,* that policy "directly constrains individual [site-specific rezone] land use decisions." 162 Wn.2d at 613.

The argument of Amicus has no merit, and should be disregarded.

VI. CONCLUSION

There is no need for additional "clarification" of the law by the Supreme Court. The law is clear that site-specific rezone decisions are subject to review pursuant to LUPA standards and remedies. *Woods v. Kittitas County,* 162 Wn.2d 597, 174 P.3d 25 (2007).

The Petitions for Review in this case should therefore be denied.

DATED this 21st day of June, 2010, at Seattle, Washington.

Respectfully submitted,

McCULLOUGH HILL, P.S.

G. Richard Hill WSBA No. 8806
Attorneys for Appellants

GROEN STEPHENS & KLINGE, LLC

John Groen, WSBA No. 20864
Attorneys for Appellants

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DECLARATION OF SERVICE

G. Richard Hill, WSBA 8806
McCullough Hill P.S.
701 Fifth Avenue, Suite 7220
Seattle, WA 98104
(206) 812-3388

John M. Groen, WSBA 20864
Groen Stephens & Klinge
11100 NE 8th Street, Suite 750
Bellevue, WA 98004
(425) 453-6206

I, Laura Counley, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am employed with McCullough Hill, PS, attorneys for Appellants. On the date indicated below, I caused the original PHOENIX DEVELOPMENT'S ANSWER TO AMICUS MEMORANDUM OF WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS AND ASSOCIATION OF WASHINGTON CITIES and this DECLARATION OF SERVICE to be filed via electronic mail on The Supreme Court of the State of Washington and courtesy copies served via electronic mail with hard copies via U. S. First Class mail on the following parties:

TIMOTHY M. HARRIS
111 21st Avenue SE
Olympia, WA 98501-2925
Email: timothyh@biaw.com

J. RICHARD ARAMBURU
JEFF EUSTIS
Aramburu & Eustis, LLP
720 Third Avenue, Suite 2112
Seattle, WA 98104
Email: rick@aramburu-eustis.com
Email: Eustis@aramburu-eustis.com

GREG RUBSTELLO
Ogden Murphy Wallace
1601 5th Avenue
Suite 2100
Seattle, WA 98101
Email: grubstello@omwlaw.com

MICHAEL WALTER
Keating Bucklin McCormack Inc
800 Fifth Avenue, Suite 4141
Seattle, WA 98104-3175
Email: mwalter@kbmlawyers.com

ROBERT D. JOHNS
Johns Monroe Mitsunaga
1601 114th Avenue SE
Suite 110
Bellevue, WA 98004
Email: johns@jmmlaw.com

MICHAEL J. MURPHY
Groff Murphy
300 E Pine Street
Seattle, WA 98122
Email: mmurphy@groffmurphy.com

PHILLIP A. TALMADGE
Talmadge Fitzpatrick
18010 Southcenter Pkwy.
Tukwila, WA 98188
Email: phil@tal-fitzlaw.com

DANIEL B. HEID
25 West Main Street
Auburn, WA 98001-4998
Email: dheid@auburnwa.gov

DATED this 21ST day of June, 2010, at Seattle, Washington.

LAURA COUNLEY

OFFICE RECEPTIONIST, CLERK

From: Laura Counley [Laura@mhseattle.com]
Sent: Monday, June 21, 2010 11:46 AM
To: OFFICE RECEPTIONIST, CLERK
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Attached, please find the following documents:

1. Phoenix Development's Answer to Amicus Memorandum of Washington State Association of Municipal Attorneys and Association of Washington Cities; and
2. Declaration of Service.

Case Name: Phoenix Development, Inc., et. al. vs. City of Woodinville, et al.
Case Number: Supreme Court No. 84296-5, Court of Appeals No. 62167-0
Filed by: G. Richard Hill, WSBA# 8806
206-812-3375
Email: rich@mhseattle.com

Thank you.

Laura D. Counley
Paralegal
McCullough Hill, PS

701 Fifth Avenue, Suite 7220
Seattle, Washington 98104
Tel: 206-812-3388
Direct: 206-812-3372
Fax: 206.812.3389
www.mhseattle.com